National Energy Marketers Association

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Amendment of Part 15 regarding new requirements And measurement guidelines for Access Broadband over Power Line Systems	**)** **)** **)**	**ET Docket No. 04-37**

COMMENTS OF THE NATIONAL ENERGY MARKETERS ASSOCIATION

The National Energy Marketers Association (NEM)[1] applauds the Federal Communications Commission (FCC) for its commitment to both price and technology-on-technology competition in the markets for telephony, cable, satellite and wireless communications. With the advent of a new IP-based digital infrastructure layer, the technology revolution appears ready for another major leap forward. As a general matter, NEM supports FCC's enforcement of existing emission standards applicable to "carrier current systems" under 47 C.F.R. Section 15.3 (f).

However, it is important to note that current BPL/PLC technology is not radio frequency energy nor is it intentionally broadcast or transmitted by radio or as radio frequency energy. Unlike broadband transmitted by satellite, DSL wire or coaxial cable, current Access Broadband transmitted over electrical power lines operates below FCC jurisdiction at a 60 hertz base band and uses inductive couplers as single-phase micro-generators to produce encoded micro-voltages of electrical energy that represent information/content.

This "electrical information/content" is inductively coupled onto power lines for either wholesale or retail transmission into, through and/or from interstate commerce. Consequently, open, non-discriminatory access to power lines is vital to compete for market share in this important new market. It should also be noted that unlike "old" electricity, the new "electrical information/content" that is transmitted within the megawatts flowing through the power lines has, in most instances, already traveled into or through either interstate or foreign commerce.

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[1] NEM is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, electronic trading exchanges and price reporting services, advanced metering, demand side management and load management firms, billing, back office, customer service and related information technology providers. NEM members are global leaders in the development of enterprise solution software for energy, advanced metering, telecom, information services, finance, risk management and the trading of commodities and financial instruments. NEM members also include Multiple Service Organizations (MSOs), inventors, patent holders, systems integrators, and developers of advanced Broadband over Power Line (BPL), Power Line Communications (PLC) technologies, and Hybrid-PLC as well.

This regionally diverse, broad-based coalition of energy, financial service and advanced technology firms has come together under NEM's auspices to help federal and state lawmakers and regulators to implement a consumer-focused, value-driven transition to a reliable, price and technology competitive retail marketplace for energy, telecom and financial related products, services, information and technologies.

I
Background

It has been fifty-five years since the Government initiated its anti-trust action against AT&T, and approximately twenty years,[i] since its network was first "opened" for price competition in the long distance market. Until this very day, local telecom competition has been elusive. Yet, this historic example of "open access" initiated a global digital/telecom revolution and saved consumers billions of dollars and enhanced productivity in both the U.S. and global economies.

NEM assumes that this rulemaking is premised on the important federal public interest represented by BPL as well as its impact on price and technology competition within both the telecommunications and energy industries. However, after a careful review of the Federal Power Act,[2] the Telecommunications Act of 1996,[3] New York v. FERC,[4] National Cable,[5] Brand X Internet Services,[6] and the Pole Attachment Act,[7] FCC jurisdiction over BPL as opposed to DSL or coaxial cable, appears limited to regulating Part 15 emissions.

However, the plain language of Federal Power Act, as well as the landmark ruling of the Supreme Court in the case of New York v. FERC, particularly when read together with National Cable, unquestionably confers FERC with primary and/or exclusive jurisdiction over both access to as well as the just and reasonable pricing of power lines used to transmit "electricity" into or through interstate commerce, regardless of "whether or not it does other things as well."[8]

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[2] The Federal Power Act gives FERC jurisdiction over the, " transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).

[3] Section 706 of the Telecom Act charges FCC with encouraging the deployment of advanced telecommunications capability using…measures that promote competition in the local telecommunications market, … The Act defines "advanced telecommunications capability"… as high-speed, switched, broadband telecommunications capability…"(emphasis added). .

[4] The Supreme Court held that FERC's jurisdiction is undeniable: "[t]here is no language in the statute limiting FERC's transmission jurisdiction to the wholesale market." "[t]hat text unquestionably supports FERC's jurisdiction to order unbundling of wholesale transactions. . .as well as to regulate the unbundled transmissions of electricity retailers." New York v. FERC, 122 S.Ct. 1012 (2002).

[5] In National Cable the Supreme Court found that, "Cable attachments providing commingled services come within the ambit of the [Telecommunications] Act." It reached this conclusion by reasoning that, "[t]he addition of a service does not change the character of the attaching entity… attachment . . . by a cable television system" is still (entirely) an attachment "by" a cable television system whether or not it does other things as well." 534 U.S. 327 (2002). Similarly, electricity that "does other things as well" (e.g. is commingled with information/content) is clearly FERC jurisdictional, and still clearly electricity within the Federal Power Act.

[6] The Ninth Circuit affirmed its prior holding that, "cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service." As a result of this classification cable broadband providers would be required to open their lines to competing Internet Service Providers. 345 F.3d 1120 (9th Cir. 2003).

[7] The Pole Attachment Act and Section 703 of the TCA provides that, "***A utility shall provide*** a cable television system or any telecommunications carrier with ***nondiscriminatory access*** to ***any pole, duct, conduit, or right-of-way*** owned or controlled by it." 47 U.S.C. § 224(f)(1). **Congress' omission of "wires" from FCC's jurisdiction could not be more obvious or intentional.**

[8] See supra note 5.

II
Recommendation

The FCC Should Stay Promulgation of a Final Rulemaking in this Docket Pending a Jurisdictional Memorandum of Understanding (MOU) with the Federal Energy Regulatory Commission (FERC)

FCC has a long-standing and increasingly admired but contentious role to play in promoting both price and technology-on-technology competition in the telecom, cable, wireless industries and more recently in broadband over satellite, DSL telephone lines and coaxial cable services. This is a tall order for any agency, particularly when the titans of global commerce are anxiously guarding their proprietary infrastructures against new competitors.

What makes FCC's policy decisions so difficult is that all of the parties are eager to compete with both price and technology, but the start-ups, like MCI before them, need "open, non-discriminatory access" to the existing network infrastructure before true price competition can reach the consumer. The FCC clearly has jurisdiction over emissions from traditional carrier current systems that transmit radio signals for use by electrical utilities to maintain the grid.

However, it is equally clear that only the FERC has federal jurisdiction over power lines used to transmit electrical energy in interstate commerce. And, unlike broadband over DSL telephone lines or coaxial cables, broadband over power lines involves the transmission of electrical energy over electric power lines. Additionally, absent a specific legislative amendment to the Pole Attachment Act to add the words "electric wires," it is overwhelmingly clear that Congress never intended the FCC to assert federal regulatory jurisdiction over electrical energy transmitted over power lines. Additionally, absent such an amendment, NEM would be extremely concerned if the FCC, by this rulemaking, intends to exercise jurisdiction over the use of electrical power lines to transmit electrical energy commingled with information/content.

NEM urges this Commission to refrain from amending Part 15 to include BPL technology and to postpone issuance of a final rule in this proceeding until both the FCC and the FERC can more accurately assess the potentially significant anti-competitive impacts that can result from FCC asserting jurisdiction over this new technology without the statutory authority to order "open, nondiscriminatory access" to power lines.

Additionally, NEM urges the FCC to enter into a Memorandum of Understanding (MOU) with the FERC to apportion jurisdiction over BPL prior to the issuance of a final rule herein. Within the MOU, the FCC should properly enforce any relevant Part 15 emissions standards. Likewise, the MOU should clarify and ensure that the FERC will exercise its statutory authority over power line access and pricing, enforce its prohibitions against market power abuse, and maintain its statutory authority over wholesale and unbundled retail transmission of electrical energy ["whether or not it does other things as well." 534 U.S. 327 (2002)].

IV
Conclusion

The National Energy Marketers Association (NEM) and its members are fortunate to find themselves at the epicenter of major technological developments that can radically change the competitive landscape of the restructured markets for both telecom as well as energy. Some NEM members are planning to own/operate Access BPL. Some are utility affiliates, and some are not. Some are MSOs and advanced technology integrators. Some are BPL inventors and patent holders. Some are BPL developers and servicing companies.

While not all members agree or have the same business model, one thing seems certain, the generation and transmission of electricity commingled with information/content over electrical power lines (BPL/PLC) represents an added commercial value that can enhance "old" electricity for the type of work it will be expected to perform in the 21st Century.

NEM appreciates this opportunity to submit comments on the Commission's NOPR. NEM is available and offers the expertise of its members to aid the Commission in its final deliberations in this proceeding.

Sincerely,

/s/

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ENDNOTE

[i] A 1982 consent degree between the Federal Government and then integrated AT&T resulted in its breakup in January 1984. This consent degree modified an earlier degree of final judgment agreed to in 1956 that settled an antitrust case brought by the Government in 1949.